National Association of Chemical Distributors

Advancing **Stewardship**, Creating **Connections**™

June 1, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Pruitt:

Thank you for meeting with the National Association of Chemical Distributors[1] (NACD) Board of Directors on May 15 and for your willingness to address the U.S. Environmental Protection Agency's (EPA) enforcement practices that result in needless uncertainty for businesses.

The majority of NACD members are small businesses that typically do not have the resources and legal expertise to battle EPA and other agencies when charges are levied against them. Because of this, they are pressured into settling and paying the fines, justified or not. To make matters worse, EPA has consistently failed to follow up on inspections and resolve cases in a timely manner, thereby hindering the ability of companies to focus on developing and growing their businesses.

As a follow up to our meeting, we are pleased to present the recommendations below. Also included in Appendix A to this letter are some examples of enforcement abuse cases NACD members have experienced.

Clear Time Limits Between Inspection and Next Steps/Clear Resolution of Cases

NACD strongly urges EPA to adopt limits between the time of an inspection and the time when the agency presents a company with a notice of violation (NOV). There have been far too many cases in which EPA conducts an inspection and raises some issues but then the company does not hear anything until one, two, or even three years later when they are presented with a NOV and proposed six-figure penalties. If a violation is so severe that it deserves a six-figure penalty, it does not make sense for EPA to keep that company in limbo for up to three years. NACD urges EPA to adopt a policy in which inspectors are straightforward with facilities and provide them with a clear description of the next steps and the timeframe for additional action.

For minor paperwork issues such as failure to report on a substance or misreporting an amount, it should be EPA's policy to notify the company of the violation **no later than 60 days following the inspection**. For more complex issues such as failure to implement a Risk Management Plan properly, it should be EPA's policy to notify the company of the violation **no later than 120 days following the inspection**.

[1] NACD's nearly 440 member companies are vital to the chemical supply chain, providing products to over 750,000 end users. NACD members are leaders in health, safety, security, and environmental performance through implementation of NACD Responsible Distribution®, established in 1991 as a condition of membership and a third-party-verified management practice. For more information, visit www.NACD.com.

Further, these notifications must include ***all*** items of concern identified by EPA. NACD members have reported that, in many cases during negotiations with EPA, the agency has raised additional issues that were not included in the original notices.

If EPA fails to follow these timelines, the case should be considered closed and EPA prohibited from taking additional action against that company on the matter.

Once EPA has issued a violation notice and the company has responded, EPA should be held to the same timelines for response as the company. For example, if a company has 15 days to respond to an EPA order, the agency should have 15 days to follow up on that response. If EPA fails to follow the prescribed timeline, proposed penalties should be reduced, for example, 10 percent for each day over the required response date. EPA should be required to follow these prescribed timelines through final settlement of the case.

In addition, following an inspection in which EPA finds no violations, the agency should notify the company it is in good standing **no later than 60 days following the date of the inspection**.

Compliance Assistance and Grace Periods Over "Find and Fine"

Environmental protection would be enhanced if EPA would take a collaborative, compliance assistance-oriented approach rather than the too-common "find and fine" approach. EPA should work with facilities to ensure they are aware of their regulatory obligations before issuing penalties. In many cases, facilities, particularly small businesses, may be out of compliance not out of malice, but because they are simply unaware of the requirements or do not understand them. In small companies, the individual charged with regulatory compliance typically has other duties in addition to keeping current of all the federal, state, and local regulations to which the business is subject. Rather than issuing penalties without question, EPA should provide a period of time to comply.

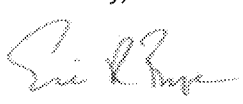
For example, if an issue is easily correctable, such as a minor paperwork oversight, EPA should give the company no more than 30 days to submit the proper/correct information. If it is a more complex issue such as failure to develop a Risk Management Plan, EPA should give the company 180 days to submit the plan. If the company fails to comply within these timeframes, it is justifiable for EPA to issue penalties.

Again, written closure that the issue has been resolved is critical.

Adoption of these recommendations would significantly increase regulatory certainty for NACD members and the business community at large.

Thank you for the opportunity to present these recommendations. If you have questions or need additional information, please do not hesitate to contact me.

Sincerely,



Eric R. Byer
President

NACD Member Examples of U.S. Environmental Protection Agency Enforcement Abuse

Title V Air Permitting, New Source Performance Standards, Hazardous Substance Release Reporting – ***Still Pending***
EPA Region 5

Charges Made Against Chemical Company in March 2008 That Remain Unresolved as of May 2017

In October 1981, a chemical company acquired from another chemical company a sulfuric acid production facility in Chicago, which the company then successfully operated for many years without any regulatory challenge by either state or federal environmental authorities.

Then, in March 2008, the U. S. Environmental Protection Agency's (EPA) Region 5 Office in Chicago, Illinois, sent Notices to the company claiming the Chicago facility that the company had operated since 1981 violated various EPA laws and regulations, including: (1) failure to obtain a federal Title V Air Permit; (2) failure to comply with federal New Source Performance Standards (NSPS); and (3) failure to report the release of a reportable quantity of a hazardous substance on December 31, 2007.

The company requested a meeting at the Region 5 Office, which took place April 15, 2008, to discuss these charges. At the meeting, one of the participating EPA representatives elaborated on the third charge, claiming the alleged December 31, 2007, hazardous release from the company's Chicago facility had caused "evacuations" of the company's neighbors. The company responded that neither the release nor the evacuations ever happened.

The day after the April 15, 2008, meeting at the Region 5 Office, an EPA attorney who had been present at the meeting called the company's General Counsel. During that conversation, the EPA attorney stated that he was surprised to hear his colleague accuse the company at the meeting of causing "evacuations" of the facility's neighbors because the EPA attorney had never before heard that accusation. After the meeting, he pressed his colleague on the issue, and, according to the EPA attorney, the EPA representative who made that accusation confessed he had made it up. The EPA attorney apologized for his colleague's false charge.

In June 2008, the company filed numerous responses to the EPA's charges, informing the EPA that, for the following reasons, the charges simply lacked merit:

1. The company is not required to obtain a Title V Air Permit because it has obtained instead a proper Federally Enforceable State Operating Permit (FESOP) that has remained continuously in good standing since its initial issuance to the company in 1981;

2. The company is not required to comply with the NSPS standards because the facility was built before those standards were enacted and, by their own terms, they do not apply to the facility;

3. Even if the NSPS standards were applicable to the company's Chicago facility, the company meets or exceeds all the material operating standards; and

4. Based upon the sworn statements of all the company's employees who were working on-site at the Chicago facility on December 31, 2007, the alleged December 31, 2007, release of hazardous material never occurred.

EPA Region 5 never replied to the company after receiving the company's June 2008 responses, nor has the EPA otherwise taken further action to resolve any of these alleged violations.

All these charges remain "open."

Toxic Substances Control Act 2012 Chemical Data Reporting – ***Still Pending***
EPA Region 10

1. A small company in Region 10 submitted its 2012 Chemical Data Report (CDR) to EPA June 5, 2012.

2. On May 16, 2013, Daryl D. Hudson and Dan-Tam Nguyen from ERG, an auditing firm for EPA, arrived to do a spot audit of the company's CDR submission.

3. Emails were exchanged and data requested by the auditors through the end of 2013.

4. Re-submission of data with corrections to the original report of June 5, 2012 were entered into EPA December 27, 2013.

5. Subpoena and Order to Show Cause Letter were received from EPA in the company's office June 13, 2016.

6. Subpoena and Order to Show Cause Letter addressed **ONLY TWO** violations/issues.

7. A conference call was held July 26, 2016, with Deniz Ergener and Tony Ellis of EPA. EPA confirmed they received the company's reply to the subpoena and they were satisfied with the reply and closed the subpoena.

8. During the conference call of July 26, 2016, **FIVE** issues/violations were discussed instead of two. This was the first the company learned there were three more violations than those outlined in the Order to Show Cause. They showed the company had two failed to report and three mis-reported quantities. Initial fines were discussed: Fail to report, $24,080 per product; Mis-reporting, $18,420 per product.

9. The company submitted evidence to show corrections, responses etc.

10. A conference call was held September 1, 2016, again with Deniz Ergener and Tony Ellis of EPA. Tony Ellis announced on this call that they were only fining the company for one Fail to report equaling $24,080.00 and one Mis-Report equaling $18,420 — a total fine of $36,125.

11. Since that time, the company has engaged in discussions to negotiate fines down based on company financial performance etc. They have submitted tax returns for the past three to four years to demonstrate rationale for lowering the fines. The company was advised last year EPA would be lowering the fines, and the company has been very cooperative etc. The company submitted additional financial information in January. They have not heard from EPA since.

Time/Resources Spent on this Case:

The company's inside general counsel (GC) did all the legal work. An estimated breakdown of time spent on this case is as follows:

GC time: 50-70 hours total
CFO time: 30-40 hours total
Compliance director: 60-80 hours total
Purchasing Manager: 60-80 hours total

This includes overlap as they had several calls with EPA where three to four company staff were on the call. They had to do significant recalculations and re-checks of their information to prove to the EPA they did not deserve to be penalized for certain items (this was a lot of data combing done by the compliance and purchasing managers, and then reviews and revisions by the GC and CFO). This is all tedious and seriously time consuming. The GC also drafted letter responses back and forth and those take a long time to get right.

The bottom line is that this small company was fortunate to have a talented GC who could lead the effort on this. The necessity to retain counsel would have led them to spend less time on it and just cave in and pay the fines. This is the usual cost/benefit analysis of paying money to lawyers to pay less money to the EPA, which is an all-too-common situation for small businesses like NACD members.

Federal Insecticide, Fungicide, and Rodenticide Act Labeling – ***Still Pending***
EPA Region 7

- A company in the Midwest purchased a label for a pesticide in 2011.
- EPA examined the label and instructed the company to make changes. The company did exactly as EPA asked.
- In 2013, the company decided to use a different (EPA-approved) vendor and alerted EPA. The company used the same label.
- EPA issued a Stop and Hold, asking the company to re-label. The company submitted to EPA and, upon further revisions, resumed business with the product.

- In 2016, EPA informed the company that information on the label was improper and issued a Stop and Hold.
- Of note:
    - EPA approved this same information in 2013.
    - The company has been going back and forth for months with the EPA Office of Pesticide Programs and the Office of Enforcement and Compliance Assistance.
    - EPA has noticed a penalty of $160,000 as of May 2017.
    - The company has spent nearly $250,000 on legal fees and communications with EPA.

Resource Conservation and Recovery Act Corrective Measures Study Approval Delays – ***Still Pending***
EPA Region 7

Extensive delays on remediation plan approvals at a facility in Kansas City.

In 1990, Elementis Chemicals and a subsidiary of Philips Electronics signed an Administrative Order on Consent (AOC) with EPA to conduct a Resource Conservation and Recovery Act Facility Investigation and Corrective Measures Study (CMS).

In 2001, Harcros was added to the AOC as a Respondent.

In October 2002, the Respondents submitted the CMS outlining the approach to remediate the property. The CMS proposed that certain areas of surface soil contamination would be capped, certain areas of subsurface soil would be subjected to treatment, indoor air would be addressed, and groundwater would be controlled and stabilized to prevent contaminants from migrating into uncontaminated areas and eventually to the Kansas River. To date, EPA has neither approved the 2002 submission nor provided comments, amounting to 14.5 years of review. The Respondents have approached EPA numerous times to break the silence and proceed with approving the CMS with no success. The Respondents met with EPA management, and the agency promised to review the CMS; however, the agency did not follow up. The Respondents approached the highest levels of EPA management each time in attempts to restart the project. The lack of feedback from EPA seemed to be caused by staffing issues rather than a controversial cleanup plan.

Because the Respondents sensed EPA's lack of progress in the early 2000s, they began to strategically implement the corrective measures. They designed a Soil Vapor Extraction System (SVE) in 2002 and submitted the plans and specs for EPA review. EPA said that if the SVE system was installed, it would be at the Respondent's own risk. They proceeded with installation of the SVE system on their own in a six-acre area (mid-area) of the facility and subsequently added a western tank dike area and a sub slab under the main warehouse. To date, they have removed 34,500 pounds of solvents from the vadose zone. They have also paved a few areas at their own risk to cover surface soil that exceeded corrective action goals. With respect to groundwater, they agreed to install two extraction wells on the river side of the levee as part of an AOC modification and pump 175 gallons per minute to maintain a capture zone that was sufficient to keep the plume from migrating. To date 3/4 of a billion gallons have been pumped

and treated from the extraction wells. Each extraction well captures a different plume (northern and southern plumes).

In 2010, a request was made to terminate pumping at extraction well EW-1 since the goals of the AOC had been met. EPA requested various technical information, which was quickly provided for review. Years went by with no response even though the Respondents submitted additional technical information as requested by the agency.

After six years of review, EPA approved the termination of pumping at EW-1. The most basic review took EPA years to accomplish while a group of qualified persons could have reviewed the same information and reached a conclusion in a matter of hours or days. EW-2 continues to pump at 100 GPM, and "at their own risk" the Respondents are addressing the southern plume by introduction of a carbon source to promote anaerobic degradation of the chlorinated solvents.

Three years ago, Harcros approached EPA after experiencing several derailments at the facility. The rail system needs to be upgraded to address a worn system and to handle heavier and longer rail cars. Harcros retained a design firm to upgrade the system to improve turning radius, install heavier track with additional spurs to handle more trans loading business, and improve secondary containment at loading/unloading stations. Since the soil beneath the rail tracks is contaminated above cleanup objectives, Harcros needed EPA's blessing on the extent of excavation and classification of the waste.

Three years later, Harcros still does not have approval to begin construction. EPA is being extremely conservative and frankly not in compliance with their own guidance for waste classification. In short, EPA believes all the excavated soil would be a listed waste, while the Respondents believe the waste would be subjected to characteristics testing. To form an opinion on this topic, Respondents gathered all spill information from their files and provided it to Arcadis for review. This review was comprehensive and included many documents from litigation between the Respondents. Arcadis prepared a 40-page white paper on the waste classification subject, and a meeting was held with EPA to discuss. An additional meeting was planned but was canceled by EPA due to the "transition of presidents."

There are many other details that may be relevant regarding this case, but this summary conveys the sense of frustration the Respondents have confronted on the project. Harcros is happy to provide additional details upon request.

Toxic Substances Control Act (TSCA) – Failure to File a Premanufacture Notice – ***Settled***
EPA Region 2

1. August 2013 – The company was notified of a possible TSCA import matter. The company internally confirmed the same day materials in question were not on the public inventory.

2. August 2013 – Company met with EPA officials at their offices in New Jersey.

3. September 2013 – Company submitted requested documents/records to EPA officials.

4. November 2014 – Company counsel reached out to EPA for a status update report.

5. January 2015 – Counsel made contact with EPA (delays over the Christmas holidays).

6. February 2015 – Company obtained agreement from supplier to accept a return of the material. (They had previously communicated to EPA disposal costs were excessive, and hazardous, at which point EPA agreed material could be returned to manufacturer in India).

7. June 2015 – Consent agreement and no further action letter received. Then the company later determined it was only an internal EPA agreement on fines and not a final consent agreement.

8. December 2015 – Official consent agreement received (only after requesting the document from the EPA and subsequently learning they originally sent it to the wrong contact; this also required the company and counsel to document the incorrect mailing and had EPA agree to accept a new timeline to execute the order and return the material, otherwise they risked failing to meet the imposed deadline in the agreement). A delinquency notice from the EPA was received and not cleared up until January 2016.

9. February 2016 – Material was shipped to India.

The experience from start to "finish" was 30 months. The company's costs continued to climb as they had to pay storage/inventory costs on approximately 200,000 pounds of quarantined material.

From the company's side, it was more the lack of feedback from the EPA, and they were reluctant to "poke the sleeping giant" and thereby provoke the agency to take further action beyond the original scope of the issue.

Brenntag Northeast Multi-Media Inspection – ***Settled***
EPA Region 3

The following summarizes a timeline and events associated with the EPA's multi-media inspection of the Brenntag Northeast, Reading, Pennsylvania, facility.

- **July 29-30, 2014**: Representatives from EPA Region 3 began a facility inspection for compliance with the Resource Conservation & Recovery Act (RCRA). No results or findings were issued or discussed with Brenntag personnel at the conclusion of the visit.

- **March 23, 2015:** EPA provided Brenntag with an inspection report resulting from the July 29-30, 2014, visit and a Request For Information (RFI) pursuant to the Clean Water Act; RCRA; and the Comprehensive Environmental Response, Compensation, and Liability Act. The agency requested a full response to the RFI by May 11, 2015. Since the nature of RFIs is to request a significant amount of detailed information, typically EPA will grant an extension of time for submittals. However, in this case, Brenntag's

request for an extension and proposal to provide a rolling response over a period of time was denied by the agency. The unprecedented denial of the extension request signaled to us that EPA was not satisfied with the facilty's attention to regulatory detail in management of hazardous materials. After internal review of the inspection report by Brenntag legal counsel and a detailed tour of the facility, it was determined the EPA inspector(s) must have developed some incorrect impressions of the facility's preparedeness for a major spill event which, in turn, led EPA to believe mistakenly there were significant noncompliance issues. Ultimately, Brenntag informed EPA that their timeline request for RFI submittal was unreasonable and information would be provided as quickly as feasible. Brenntag provided the requested RFI material to the agency May 11, 18, 26, 27; June 5, 17, 30; and July 13, 18, 2015. Preparation of this response required approximately 650 workhours by Brenntag personnel and expense associated with guideance from environmental consultant and legal counsel.

- **May 20, 2015:** EPA inspectors returned to the facility to conduct a Clean Water Act and Spill Prevention inspection.

- **August 26, 2015:** Brenntag received report from EPA summarizing all inspection findings with allegations of 12 alleged violations. However, EPA did not provide any information on initial proposed penalties for the alleged violations. Based on similar violations imposed on other companies, the company's internal estimate of a proposed penalty was between $350,000 and $500,000. Brenntag began formulating a response to the alleged violations and requested a meeting with the agency to start the negotiation process.

- **September 15, 2015:** Brenntag submited its intial response to the agency, denying seven of the 12 alleged violations. The agency agreed to meet at the facility September 25 to start negotiations.

- **September 24, 2015:** At approximately 4:30 PM, Brenntag received notification from the agency of their intent to cancel the originally agreed upon meeting date of September 25. This resulted in Brenntag incurring unnecessary cost associated with time/travel expense for key company personnel, environmental consultants, and external legal counsel. Furthermore, the agency informed Brenntag counsel of their intent to file the Administrative Compliant by the end of the month so as to meet a fiscal year-end deadline. Brenntag was also informed, verabally, that the initial proposed penalty for the 12 violations would be $440,000.

- **September 30, 2015:** EPA filed the Administrative Complaint without meeting with Brenntag — thus, effectively denying the company's right to due process to defend or rebut the alleged violations.

- **October 30, 2015:** Based on EPA's pre-Complaint conduct and communications, Brenntag decided a Settlement Conference with Regional Office personnel would not be helpful in resolving this issue. Therefore, a motion was filed by Brenntag counsel requesting utilization of the Alternative Dispute Resolution (ADR) process administered by the Office of Administrative Law Judges. Upon receipt of the ADR notification, the EPA's Regional Office Counsel immediately contacted Brenntag to request a meeting to negotiate this issue.

- **November 20, 2015:** Brenntag agreed to a meeting with EPA Regional Officials in their Philidalephia office December 4, 2015.

- **December 4, 2015:** Brenntag finally met with EPA Regional Officials to review the alleged violations and began the negotiation process. Furthermore, Brenntag invited the officials to the facility so they could see first hand the facility's condition and how it is operated. Facility meeting was agreed upon for December 11, 2015.

- **December 11, 2015**: EPA Regional Officials visited the Reading facility and negotiations continued.

- **March 14, 2016:** EPA and Brenntag signed a Consent Agreement and Final Order resolving the matter. Seven of the original 1) alleged violations were ultimately dismissed. The remaining five violations were all administrative and paperwork in nature. Brenntag agreed to a civil penalty of $55,000 and a $35,000 Supplemental Environmental Project to benefit the local fire department.

Although the final penalty imposed was excessive based on the nature of the violations, Brenntag made a business decision to settle so as not to incur additional expenses. What is extremely troubling was this EPA Region denying a regulated company the right to due process under the law in order to meet an arbitrary fiscal year deadline. It was obvious that meeting this deadline was more important to the agency than actually resolving this issue. Furthermore, the lack of willingness demonstrated by the agency to engage in good faith negotiations led to an increase in hostility and animosity between the parties. Instead of taking approximatley 20 months to resolve this issue, in reality, the case could have been completed within 90 days. In his 28-year career dealing with EPA, Brenntag's Director of Safety, Health, & Environment has never had a similar experience where a Region deviated so far away from standard operating protocol, demonstrated such an unwillingness to negotiate in good faith, and denied a company due process to defend against alleged violations.